BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

OSCAR HERNANDEZ Claimant	)	
VS.	)	Docket No. 1,006,257
TYSON FRESH MEATS Self-Insured Respondent	)	

ORDER

Claimant requested review of the October 13, 2004 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on March 29, 2005.

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for the claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ adopted the findings of independent medical examiner Dr. Lynn D. Ketchum and found that claimant sustained a 36 percent functional impairment to his left upper extremity, but further found claimant was not yet at maximum medical improvement and that his present percentage of impairment was "more than likely not permanent".[1] This conclusion is based upon the undisputed fact that claimant had rejected both the surgical and conservative treatment options offered by the treating physician. The ALJ found claimant's refusal to be unreasonable and without basis under K.A.R. 51-9-5. As a result,

[1] ALJ Award (Oct. 13, 2004) at 2.

the ALJ did not award any permanent partial disability compensation, but did grant temporary total disability benefits, future medical treatment and an unauthorized medical allowance.[2]

The claimant requests review of the ALJ's Award, alleging the ALJ erred in failing to grant him a monetary award to reflect his permanent partial disability. Claimant argues that the risks associated with the suggested surgical procedures, particularly the chance of success and permanent improvement, are a sufficient basis to refuse the treatment and do not justify the ALJ's decision to withhold a monetary award.

Moreover, claimant maintains he is entitled to an increase in the functional impairment of the left upper extremity from 36 percent to 40 percent based upon the evidence contained within the record.

Respondent argues that claimant should be denied permanent partial disability compensation on the basis of the testimony of Dr. Scott A. Langford, who stated that "claimant has neither carpal tunnel syndrome nor cubital tunnel syndrome in his left upper extremity, and in fact has a zero percent permanent partial impairment."[3] Respondent also contends that compensation should be denied because claimant was not at maximum medical improvement, and that he unreasonably refused any kind of treatment for his injuries.

The issues to be resolved by this appeal are as follows:

1. The nature and extent of claimant's disability, including whether he has suffered a permanent partial impairment; and

2. Whether the claimant's refusal of treatment was unreasonable, thereby justifying a denial of permanent partial disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained a compensable injury to his left hand, wrist and elbow on July 17, 2002, while working for respondent. Conservative treatment was initially offered in the form of medications.

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[2] *Id.* at 2-3.

[3] Respondent's Brief at 1-2 (filed Dec. 21, 2004).

Claimant was thereafter referred to Dr. Anne S. Rosenthal for further evaluation and diagnosis. At this first visit claimant complained of left hand numbness with tingling in his ring and small finger. There were no complaints relative to the shoulder, nor any symptoms in the thumb through the long finger. Yet, the nerve testing completed in October of 2002 revealed moderate carpal tunnel syndrome and moderate to severe cubital tunnel syndrome, both on the left. It appears from Dr. Rosenthal's records that she was somewhat perplexed by the claimant's presentation. She noted that claimant "has no evidence whatsoever on examination or by history of carpal tunnel syndrome, but a moderate carpal tunnel syndrome on a nerve test".[4]

On February 19, 2003 during a follow-up visit, Dr. Rosenthal found claimant had a negative elbow flexion test and a negative percussion test throughout the left upper extremity, as well as a negative carpal tunnel on the left. At this point Dr. Rosenthal was still recommending claimant have a second EMG/NCV of the left upper extremity to look at the cubital tunnel and the radial nerve. Results of a nerve conduction study by Dr. Pratt on March 12, 2003, revealed moderate left carpal tunnel syndrome and mild left ulnar nerve entrapment at the elbow.

On March 28, 2003, claimant saw Dr. Scott A. Langford, an associate of Dr. Rosenthal's. During this visit claimant had a positive flexion test, but tested negative for carpal tunnel and had no popping or snapping of the ulnar nerve at the elbow and had no tenderness along the area. Dr. Langford concluded claimant's physical symptoms and examination were inconsistent with carpal tunnel syndrome. He did, however, conclude claimant might possibly have cubital tunnel problems in the left elbow as claimant expressed some features that were suggestive of that condition. But he found that diagnosis "unclear" at that time.[5] Therapy was suggested and declined, so claimant was given Naprosyn.

Claimant had a final evaluation with Dr. Langford on April 28, 2003. At this time claimant was showing signs of improvement and it seemed that the medication was helping his symptoms. Then, on May 23, 2003, Dr. Langford sent a letter to respondent stating that claimant was at maximum medical improvement and that he assessed the following permanent partial impairment: "good range of motion of the left elbow, which translates to a zero percent (0%) left upper extremity impairment permanent partial impairment and zero percent (0%) whole person impairment."[6]

Claimant's present complaints include pain in his left shoulder, elbow, wrist and hand. His pain level in the shoulder is a 7 out of a possible 10. He has a difficult time

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[4] Langford Depo., Resp. Ex. B at 1-2 (Dr. Rosenthal's Oct. 2, 2002 report).

[5] *Id*. at 8.

[6] *Id.*, Resp. Ex. C (Dr. Langford's May 23, 2003 letter).

raising his arms and his shoulder pops when he moves it. Claimant indicated that the area of his fingers on his left hand and all the way up to his left elbow fall asleep with a constant pain level of 7 out of a possible 10. This occurs every night and awakens him. The elbow is painful as well with the pain level at 8 out of a possible 10. He continues to take pills for the pain and has loss of strength in his hand. As a result, claimant has difficulties lifting anything heavy. Claimant's left elbow also pops and although he wears a sleeve to keep it from bending and popping, it is not really helping that condition.

Dr. Pedro Murati evaluated claimant on December 12, 2002 and again on July 3, 2003, both times at the request of his lawyer. In his first report, Dr. Murati noted complaints of "left elbow pain and popping; pain radiating up into the arm with movement and down to the fingers; left shoulder pain."[7] Dr. Murati diagnosed left carpal tunnel syndrome, left ulnar entrapment at the elbow, and myofascial pain syndrome affecting the left shoulder girdle based upon the EMG performed on September 13, 2002. His records indicate claimant declined any suggestion of surgery and merely wanted to resolve his claim.

The purpose of the July 2003 visit, was for Dr. Murati to provide an impairment rating. His diagnosis was much the same, although there is an additional reference to myofascial pain syndrome affecting the left shoulder girdle.[8] At that point, Dr. Murati restricted claimant to working an 8 hour day as tolerated based on the belief that this was related to the work-related injury that occurred on July 17, 2002. Dr. Murati assigned a 10 percent impairment to the left upper extremity based on the fourth edition of the *Guides* for the carpal tunnel syndrome. For the left ulnar cubital syndrome 10 percent impairment was assigned, for the loss of range of motion of the left shoulder 4 percent was assigned. Using the combined values chart these combine for a 22 percent left upper extremity impairment.

When the parties could not agree upon claimant's functional impairment, the ALJ appointed Dr. Lynn D. Ketchum to serve as the court-appointed independent medical examiner. According to Dr. Ketchum, claimant told him that in the course of his employment with respondent he developed pain in his left hand, wrist, elbow and shoulder, along with weakness and paresthesias or pins and needles sensation in the fourth and fifth digits, all of which he reported to his supervisors.[9] Dr. Ketchum reviewed claimant's records and conducted his own examination in which there was evidence of positive Tinel's over the ulnar nerve distribution at the elbow. Two point discrimination was normal in all digits on both hands. Grip strength indicated evidence of good effort through a bell shaped

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[7] Murati Depo. at 5-6.

[8] *Id.*, Ex. 2 at 2.

[9] Ketchum Depo. at 5.

curve, however he had significant weakness on the left side.[10] Dr. Ketchum noted that some of the aspects of claimant's presentation were not supportive of the moderate severity of nerve entrapment suggested by the nerve conduction studies themselves.[11]

Dr. Ketchum diagnosed chronic cubital tunnel syndrome and carpal tunnel syndrome of moderate degree. Dr. Ketchum imposed the restrictions of no repetitive gripping, no repetitive elbow flexion and no lifting over 15 pounds on an occasional basis.[12] He also assigned claimant a 20 percent impairment of the upper extremity and 20 percent to the elbow which makes 40 percent permanent partial impairment of the left upper extremity based upon the AMA *Guides*, 4th Edition.

When asked to explain the basis for his rating, Dr. Ketchum offered the following:

> According to the AMA Guides to Permanent Partial Impairment, fourth edition, table 16, page 57, it lists a 30 percent permanent partial impairment of the upper extremity for a moderate compression of the ulnar nerve at the elbow. When Dr. Pratt did his last EMG, he said there was improvement, but he never really stated in his opinion whether it was mild or moderate. So I sort of downplayed it a little bit, instead of 30 percent, 20 percent.[13]

Dr. Ketchum was also asked to explain why he chose not to utilize the combined values chart as dictated by the Guides. While he conceded that a proper combination of the two 20 percent ratings would be 36 percent, he indicated that in assigning a lower rating to the elbow, down from 30 to 20 percent, that he felt that it was appropriate to merely add the two percentages together rather than use the combined value chart.

At his deposition Dr. Murati was asked to review Dr. Ketchum's rating report. After doing so, Dr. Murati agreed with Dr. Ketchum's analysis relative to the elbow and adopted Dr. Ketchum's 20 percent impairment to the elbow. This change would therefore increase his opinion as to claimant's impairment to the left upper extremity from a 22 percent to a total of 31 percent.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

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[10] *Id.*, Ex. 2.

[11] *Id.* at 15.

[12] *Id.,* Ex. 2 at 2.

[13] *Id.* at 21.

right depends.[14] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[15]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[16]

While the ALJ adopted the opinions of Dr. Ketchum, the independent medical examiner and found claimant bears a 36 percent functional impairment to the left upper extremity, the Board believes it should be modified. After reviewing and considering the medical reports and opinions expressed in this case, the Board finds that it is more likely than not that claimant's true impairment lies somewhere in between the zero percent expressed by Dr. Langford and the 36 percent expressed by Dr. Ketchum. Thus, the Board finds that claimant's permanent partial impairment is 15 percent to the left upper extremity.

Although the ALJ assessed a functional impairment (which has now been modified), he concluded that claimant's refusal to accept further medical treatment was "unreasonable and without basis".[17] He went on to explain that the surgery Dr. Ketchum suggested carried with it a high probability of success with little risk, and that it would be in appropriate to speculate upon what claimant's impairment might be if he elected to undergo the recommended surgical procedure. Thus, "[b]ecause claimant's post surgery impairment is uncertain, the court declines to enter an award of permanent partial partial disability even at the lower level of functional impairment Dr. Ketchum believed likely after surgery."[18] With that, claimant's Award was limited to the value of the temporary total disability benefits paid. Interestingly, this finding was made without any reference to any statute or regulation.

The Board has considered this finding and concludes the ALJ erred. Kansas law does permit compensation to be denied or terminated under certain circumstances. That regulation provides as follows:

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[14] K.S.A. 44-501(a).

[15] K.S.A. 44-508(g).

[16] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

[17] ALJ Award (Oct. 13, 2004) at 2.

[18] *Id.* at 3.

> An unreasonable refusal of the employee to submit to medical or surgical treatment, when the danger to life would be small and the probabilities of a permanent cure great, may result in denial or termination of compensation beyond the period of time that the injured worker would have been disabled had the worker submitted to medical or surgical treatment, but only after a hearing as to the reasonableness of such refusal.[19]

This rule which allows the modification or cancellation of an award for refusal to submit to reasonable medical treatment is a forfeiture provision. Where the issue is raised, the burden of proof is upon the employer.[20] Among the factors to consider in determining whether an individual's refusal to undergo treatment is reasonable are the following: (1) that the risks of surgery were small, (2) that the prospects of success were high, and (3) that the claimant presented no sound reason to refuse the surgery.[21]

In this instance there was no hearing at which the issue of claimant's alleged unreasonable refusal was addressed. Respondent did not assert this as a defense at the prehearing settlement conference nor in his brief to the ALJ. It appears that this is a concept seized upon by the ALJ after the case was submitted.

The Board has considered this issue and concluded that because respondent failed to meet its burden of proof on this issue and because there was no hearing on the issue, K.A.R. 51-5-9 does not authorize the ALJ's finding that claimant is not entitled to permanency benefits.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 13, 2004, is modified as follows:

The claimant is entitled to 6 weeks of temporary total disability compensation at the rate of $297.63 per week in the amount of $1,785.78 followed by 30.6 weeks of permanent partial disability compensation, at the rate of $297.63 per week, in the amount of $9,107.48 for a 15 percent loss of use of the left upper extremity, making a total award of $10,893.26.

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[19] K.A.R. 51-9-5.

[20] *Evans v. Cook & Galloway Drilling Co.*, 191 Kan. 439, 444, 381 P.2d 341 (1963).

[21] *Martinez v. Excel Corporation*, 32 Kan. App. 2d 139, 79 P.3d 230 (2003).

IT IS SO ORDERED.

Dated this _____ day of April, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director